No. 90-1912

In the Supreme Court of the United States

October Term, 1991

STEPHANIE NORDLINGER,

Petitioner,

v.

KENNETH HAHN, in his capacity as Tax Assessor for Los Angeles County, and the COUNTY OF LOS ANGELES,

Respondents.

REPLY BRIEF OF PETITIONER

CARLYLE W. HALL, JR.*
MARY LOUISE COHEN
ANN E. CARLSON
ELIZA VORENBERG
Hall & Phillips
10951 West Pico Boulevard,
Third Floor
Los Angeles, California 90064
(310) 470-2001
Attorneys for Petitioner
*Counsel of Record

Petition for Certiorari Filed May 28, 1991
Certiorari Granted October 7, 1991

Westside Law Publishers Los Angeles, California (310) 207-0272

TABLE OF CONTENTS

TABLE OF AUTHORITIES CITED

Page

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

MISCELLANEOUS

REPLY BRIEF OF PETITIONERS

Respondents do not dispute that the Webster County welcome stranger property tax assessment method struck down in *Allegheny Pittsburgh Coal Co. v. County Commission of Webster County, West Virginia*, 488 U.S. 336 (1989) operates identically to Proposition 13's assessment provisions. Resp. Br. at 38. Nor do they dispute that Proposition 13's welcome stranger provision has resulted in gross disparities in the taxes assessed on properties of comparable value. Resp. Br. at 8, 47. These disparities are so indisputable that the court below took judicial notice of them (Pet. App. A12), and, just last month, the California Supreme Court described Proposition 13's assessment method as a "wild card" system that creates "substantial inequalities" now reaching 20 to 1 in Los Angeles County. *Southern California Rapid Transit District v. Bolen*, No. S015986, 1992 W.L. 14315, at *22 n.8 (Cal., Jan. 30, 1992). As respondents acknowledge, the "crucial" question remaining in this case is whether California's formal embodiment of the discriminatory policy into state law transforms an otherwise unconstitutional practice into one that is constitutional. Resp. Br. at 38.

On this admittedly "crucial" question, respondents offer an interpretation of *Allegheny* that patently conflicts with the decisions of this Court cited in Petitioner's Opening Brief — *cases whose existence respondents do not even acknowledge*. These cases hold that it does not matter whether a discriminatory governmental classification is established by state law or by administrative practice even when that practice is in defiance of state law. The only question is whether the classification is *rational*, irrespective of state law. The welcome stranger assessment method struck down in *Allegheny* failed to meet the rational basis test. 488 U.S., at 344-45. Respondents do not suggest that *Allegheny* was wrongly decided. Proposition 13's functionally identical and equally discriminatory assessment method must suffer the same fate.

I.

THE FORMAL EMBODIMENT OF A WELCOME STRANGER PROPERTY TAX ASSESSMENT SCHEME INTO STATE LAW DOES NOT SAVE IT FROM CONSTITUTIONAL DEFECT.

Respondents attempt to distinguish *Allegheny* by asserting that the Webster County assessor was "limited to justifying the State's assessment practices with reference to West Virginia's objective of taxing property based on current market value." Resp. Br. at 38. Accordingly, respondents contend that the assessor there could not offer several of the justifications urged by respondents, who are defending the same welcome stranger taxation method in a state that has formally adopted it as state law. *Id.*[1] Respondents' contentions flatly contradict this Court's long-standing precedents, as well as a host of circuit court decisions.

In both *Nashville, C. & St. L. Ry. v. Browning*, 310 U.S. 362 (1940) and *Snowden v. Hughes*, 321 U.S. 1 (1944), the Court made clear that the Federal Equal Protection Clause applies in the same manner whether the challenged discriminatory classification is formally adopted by state law or is administratively adopted in violation of state law or policy. Applying the rational basis test, the Court in *Snowden* thus stated:

> the action of [an administrative] Board is ... subject to constitutional infirmity to the same but no greater extent than if the action were taken by the state legislature. Its illegality under the state statute can neither add to nor subtract from its constitutional validity.

321 U.S., at 11.

In both *Browning* and *Snowden*, the challenged classifications imposed by administrators contravened state law.[2] According to respondents' reasoning, both actions should have been found unconstitutional because the defenders of the actions should have been limited to justifications that comported with state law or policy. The Court, however, upheld the classifications despite the conflict with state law and policy — and specifically rejected the position advanced by respondents here. As these cases clearly indicate, the only issue facing a court in determining the validity of a discriminatory classification scheme under the Equal Protection Clause is whether, had the classification actually been official state law or policy, it had a rational basis. *See Browning*, 310 U.S., at 369; *Snowden*, 321 U.S., at 11.

If *Allegheny* really means what respondents say it does, it dramatically expands the reach of the Equal Protection Clause. An aggrieved plaintiff could challenge as a federal equal protection violation any intentional and systematic violation of state law by a state or local official. Even more disturbing, under respondents' expansive analysis, a cause of action would exist whenever a litigant

[1] Respondents do acknowledge, however, that the Webster County assessor and supporting *amici* raised many of the same arguments before the Court in support of the welcome stranger practice that respondents make here. Resp. Br. at 37 n.31.

[2] In *Browning*, the State of Tennessee, like West Virginia, required the uniform taxation of all property at current market value but assessors routinely assessed railroad property higher than all other property. 310 U.S., at 369, 371. In *Snowden*, the elections board refused to include the plaintiff's name on the general election ballot even though he clearly qualified for inclusion under state law. 321 U.S., at 2-4.

could demonstrate that the challenged action violated state *policy*, even in the face of a state court decision holding that the state or local official did not violate state law. This is precisely the argument respondents advance here to explain *Allegheny*, since, as respondents concede, the West Virginia Supreme Court upheld the Webster County assessor's actions as consistent with state law. Resp. Br. at 38 n.32. Thus, federal courts would find themselves determining not only whether a state or local official violated state law, but how far that official strayed from state policy.

This is not a merely hypothetical concern. At least three circuits have recently confronted the question whether a violation of state law necessarily gives rise to a federal constitutional violation. Each circuit has rejected the theory respondents advance to distinguish *Allegheny*, holding instead that a discriminatory classification imposed in violation of state law does not violate the Constitution unless otherwise irrational. *See Hoffman v. City of Warwick*, 909 F.2d 608 (1st Cir. 1990); *Archie v. City of Racine*, 847 F.2d 1211 (7th Cir. 1988) (*en banc*), *cert. denied*, 489 U.S. 1065 (1989); *Muckway v. Craft*, 789 F.2d 517 (7th Cir. 1986); *Stern v. Tarrant County Hosp. Dist.*, 778 F.2d 1052 (5th Cir. 1985) (*en banc*), *cert. denied*, 476 U.S. 1108 (1986).

Moreover, it is easy to imagine situations that could lead to new federal constitutional claims. For example, in a state that prohibits age discrimination, a local recreation district might adopt a weekly adults-only pool day at its public pools. A claimant could challenge the recreation district policy under the Federal Equal Protection Clause. Under respondents' theory, the district would be precluded from offering any justifications for its policy that conflict with the state's policy against age-based distinctions. This would be true even if a state court had already concluded

that the local official's classification was permissible under state law.

II.

RESPONDENTS' DIFFICULTY IN DESCRIBING PROPOSITION 13'S CLASSIFICATIONS ILLUSTRATES THE LACK OF RATIONAL BASIS FOR THE MEASURE'S GROSSLY DISCRIMINATORY EFFECTS.

In order to determine whether a taxation method is rationally based, "it must appear not only that a classification has been made, but that it is one based on some reasonable ground." *Colgate v. Harvey*, 296 U.S. 404, 423 (1935). Yet respondents cannot even ascertain or consistently describe the classifications Proposition 13 creates, let alone why the classes have distinguishing characteristics. They have fundamentally changed their view of the nature of the classification from the position they took in the courts below.

Previously, respondents argued that Proposition 13 establishes a new class every day, so that everyone who entered the real estate market and bought property on a given day, no matter what type or how expensive, is in the same class. *Nordlinger v. Lynch*, Brief of Respondents, filed with the California Court of Appeal, at 10. Without even acknowledging this former description, respondents now assert that "all taxpayers whose property has the same acquisition value" are in the same class. Resp. Br. at 33.

If respondents cannot even consistently define the classes of taxpayers that Proposition 13 creates, how can they identify the distinguishing characteristics of the various classes that justify differential treatment? *See City of Cleburne, Texas v. Cleburne Living Center*, 473 U.S. 432, 453 (1985) (Stevens, J. concurring) ("What is the

characteristic of the *disadvantaged class* that justifies the disparate treatment?") (emphasis supplied).

Under respondents' *prior* view of Proposition 13's classifications, more than 5,000 classes exist to date, with the last-created classes assessed at current market value and each earlier class assessed at increasingly obsolete historical values. Respondents now attempt to avoid this characterization, perhaps because it so closely resembles the prohibited "fixed, permanent distinctions between an ever-increasing number of perpetual classes" this Court invalidated in *Zobel v. Williams*, 457 U.S. 55, 59 (1982). As the "class-a-day" description highlights, later purchasing property owners can never break into the most favored earlier purchasing classes.

Under respondents' *new* view, taxpayers are "similarly situated" whenever they share the same acquisition value — no matter when they acquired the property; no matter whether the property is developed or undeveloped, commercial or residential; no matter whether, if residential, the property is a mansion or a bungalow; and no matter that one class member may have spent 1975 dollars to buy the property while another spent the same amount in much less valuable 1989 dollars. Thus, the owners of the Beverly Hills mansion and the Venice bungalow pictured at page 6 of Petitioner's Opening Brief are, under respondents' view, legislatively deemed "similarly situated" and treated with "full equality" by Proposition 13 for all relevant tax purposes. This is apparently because they share the happenstance of having paid, across the span of more than a decade, the same purchase price, and hence share roughly the same nominal acquisition value (approximately $300,000). J.A. 52-53. This class also apparently includes all owners of commercial property with the same $300,000 acquisition

value, no matter what the current market value or current income stream.

Thus, respondents essentially argue that the legislature by fiat has simply declared that all property owners, who at various points in time purchased various types of property (with wildly varying current market values and/or income streams), are arbitrarily deemed to be "similarly situated" if they paid the same purchase price. This Court has firmly rejected such a semantic sleight-of-hand: "[a] State cannot deflect an equal protection challenge by observing that in light of the statutory classification all those within the burdened class are similarly situated. The classification must reflect pre-existing differences...." *Williams v. Vermont*, 472 U.S. 14, 27 (1985).

Any system that deems the Venice bungalow, the Beverly Hills mansion, and an income-generating apartment building "similarly situated" and subject to the same taxes simply because of the fortuity of "acquisition value" surely deserves the "wild card" epithet the California Supreme Court so aptly gave it. *See Southern California Rapid Transit District v. Bolen, supra*, *22 n.8.

III.

A HOST OF ALTERNATIVE TAX SYSTEMS, INCLUDING AN AD VALOREM TAX SYSTEM BASED ON CURRENT MARKET VALUES, ARE RATIONALLY BASED.

Respondents claim that petitioner's argument is based on the premise that "current market value provides the only legitimate basis for taxation." Resp. Br. at 14. This is not her position. She argues simply that, as this Court unanimously determined only three years ago in *Allegheny*, it is irrational to have a property tax system that creates massive disparities between new buyers, whose property is

taxed at current market value, and long-time owners, whose property is taxed at increasingly obsolete acquisition values that have no connection to current circumstances. Cases relied on by respondents such as *Ohio Oil Co. v. Conway*, 281 U.S. 146 (1930) and *Bell's Gap R. Co. v. Pennsylvania*, 134 U.S. 232 (1890) in no way undermine petitioner's position.

Quantity-based taxes like those upheld in *Ohio Oil*, and traditional ad valorem taxes assessed on current market values (used in all states that levy a property tax except California),[3] are rational because they compare taxpayers by using external characteristics with current relevance to the taxes imposed. It is rational, for example, to assume that an oil field that produces 1000 barrels of oil per day is more valuable and should be taxed more than a field that generates 100 barrels. Indeed, any number of quantity-based property tax systems, including ones based on acreage of a lot or square footage of a building, would, like the *Ohio Oil* per-barrel tax, be reasonable ways to determine taxes. Such quantity-based taxes, unlike Proposition 13, do not provide favorable treatment only to those most privileged taxpayers who happen to have the good fortune to buy their property first.[4]

[3] Respondents suggest that the "taxing schemes of 17 other States [may also be] constitutionally suspect" because, as noted by *amicus* International Association of Assessing Officers, California's coefficient of dispersion (the measure of the deviation of assessments from market value) ranks 33rd. Resp. Br. at 29 n.26. Respondents neglect to point out that IAAO expressly noted that California ranked 33rd in *1981*, just three years after Proposition 13 was enacted. As the 1990 census data doubtless will show, eleven years later California ranks at the bottom.

[4] In contrast to the welcome stranger taxation method, the scheme in *Bell's Gap* was rational. There, Pennsylvania taxed *all* bonds at par value, regardless of their actual value. It did not, for example, impose a recurring annual tax at one rate for original purchasers of bonds at par value and at far higher effective rates for all subsequent purchasers based on market value at time of purchase. Had California chosen one base year (*e.g.*, 1975) and taxed all property owners based on that year,

Similarly, although petitioner does not contend that an ad valorem tax system based on current market values is the *only* rational system of property taxation, it is, nevertheless, rational to assume that two properties currently valued by the market at, say, $300,000 are alike because their owners could normally trade one for the other. Consequently, it is rational to tax them equally. That system rationally also assumes that a property with a high market value should be taxed more than a property of a lower value because the owner of the higher valued property has greater wealth. An ad valorem system based on current market values further reasonably assumes that higher valued properties should be taxed more because public services contribute to those higher values.

By contrast, it is not rational to superimpose on this otherwise rational ad valorem system an assessment cap that uses the happenstance of purchase price at a particular moment to freeze forever that property's tax assessment. To do so in both *Allegheny* and here, results over time in taxing favored property owners at artificially low, out-of-date values that grossly diverge from the far higher current market values on which recent buyers of comparable properties are taxed. The ensuing "wild card" classifications treat a mansion, a bungalow, and an office building as if they were the same, regardless of current market value or income stream, simply because each was once purchased for the same price. The ad valorem tax system based on current market values recognizes the obvious differences in these properties; Proposition 13 pretends they do not exist.

[4](...continued)
the analogy to *Bell's Gap* might be more apt. Nevertheless, such a tax on real property, which appreciates and depreciates at different rates depending upon its location and type (*e.g.*, commercial or residential), could raise constitutional concerns by failing to meet *Allegheny's* requirement of the "seasonable attainment of a rough equality," 488 U.S., at 343, a problem not presented in the taxation of bonds.

Respondents further melodramatically allege that petitioner's view would "jeopardize the constitutionality of every provision in the federal and state tax codes that furthers any policy other than" a current market value tax system. Br. at 14.[5] But in concluding that the Webster County method did not meet even the most minimal scrutiny, the Court in *Allegheny* expressly acknowledged and distinguished a host of cases in which state and local governments had established legitimate and justifiable tax classification schemes. Such classification schemes continue to be evaluated under the same equal protection standards that have governed this area of the law for more than 50 years.

IV.

PROPOSITION 13, LIKE THE WEBSTER COUNTY WELCOME STRANGER TAX ASSESSMENT METHOD STRUCK DOWN IN *ALLEGHENY*, LACKS A RATIONAL BASIS.

Much of the rhetoric in respondents' brief is aimed at the supposed evils of the traditional ad valorem system used in California just prior to Proposition 13's adoption, as though the only alternatives for California are the pre- and post-Proposition 13 systems. Respondents fail to mention the single most significant cause of the pre-Proposition 13 difficulties: despite the dramatic rise in property values, local officials *failed to reduce the tax rates*. Higher property values and corresponding higher assessments result in higher taxes only if the tax rate remains constant. If some taxpayers found themselves "taxed out of their homes" or squeezed by the failure of local officials to reduce taxes, the voters could have targeted tax relief to those actually in need, insisted that tax rates vary in inverse proportion to increases in property values, or even voted the rascals out of office.[6] Instead, they took the politically expedient option of shifting the increases in their future tax burdens to newcomers.[7]

[5] Respondents' suggestion that the taxation of capital gains at the time of sale is similar to Proposition 13 (Resp. Br. at 18 n.13) is particularly ironic. Under capital gains taxation, the seller ultimately *pays* taxes on any gain he or she experiences, in stark contrast to Proposition 13. Moreover, the person with the largest gain pays the *highest* tax on sale. Perversely, under Proposition 13, the taxpayer who experiences the largest gain in the value of his or her property pays the *lowest* effective tax rate, year in and year out.

[6] Petitioner does not claim that these alternatives are simply "wiser" than Proposition 13. The alternatives merely demonstrate that Proposition 13 was a most unnecessary means of pursuing the State's limited goals.

[7] California did, in fact, impose a revenue limitation on local governments two years after Proposition 13 passed, known as the "Gann limit." Cal. Const. art. XIII B. This limit freezes local government spending per capita at 1979 levels, adjusted for inflation. Thus the assertion by *amicus* Howard Jarvis Taxpayers Foundation that a decision striking down Proposition 13 would immediately increase taxes by tens of billions of dollars statewide is simply wrong. Br. at 11. Los Angeles County, for example, is so close to its Gann limit that if revenue from property taxes were to rise just 7% from current levels it would reach its limit. *See* State Controller, *Annual Report of Financial Transactions Concerning Counties of California*, FY 1989-90, at 134; 1991 Roll Release, Los Angeles County Assessor, at 7. *See also* Los Angeles County, *Budget-in-Brief*, 1990-91, at 13. If all County property were assessed at market value, the property tax rate would have to fall to less than half of the current 1% to stay within the Gann limit. As petitioner noted in her opening brief, a revenue neutral residential property tax rate for Los Angeles County (one that would bring in the same amount of revenue as the current system while assessing all property at its current market value) would be 0.44%. Pet. Br. at 35. Because of the Gann limit, this rate could not rise any higher than 0.47% (0.44% multiplied by 1.07).

A. As Out-of-Date Acquisition Values Grossly Diverge From Current Market Value, They Bear No Rational Connection to Ability to Pay.

This Court in *Allegheny* stated that "the fairness of one's allocable share of the total property tax burden can only be meaningfully evaluated by comparison with the share of others similarly situated relative to their property holdings." 488 U.S., at 346. Respondents ignore this directive. They instead attempt to mask the inherent irrationality of a welcome stranger taxation method by shifting attention away from the gross disparities Proposition 13 creates among similarly situated property owners. Respondents in effect say to new buyers: as long as you can pay your taxes, the very low taxes of those who are similarly situated to you are of no concern to you. *See* Resp. Br. at 19 (suggesting that whether vast numbers of taxpayers are significantly underpaying taxes is not relevant to whether Proposition 13 is rationally based).

Respondents then defend Proposition 13's enormous inequities by suggesting that they prevent homeowners from either being taxed out of their homes or being forced to spend too much on taxes and not enough on necessities. Resp. Br. at 17. But to assume that obsolete historical values 10, 15, 20, and eventually 50 or 100 years out of date relate in any way to what a taxpayer (and his or her descendants) presently can or cannot afford to pay in taxes is a legal fiction.

If the rational basis test is to mean anything, a tax assessment system cannot scatter its benefits and burdens so randomly and so arbitrarily in the name of protecting a very small group of homeowners on fixed incomes. According to respondents' asserted justification, the system bestows its greatest benefits on long-time owners of commercial property, the value of which is dependent upon its ability to generate income, and on long-time owners of Beverly Hills mansions, all in the name of preventing impoverished

homeowners from starving rather than paying their fair share of taxes.[8] In light of the massive disparities Proposition 13 creates, "the choice of a proxy criterion ... cannot be so casual as this, particularly when a more precise and direct classification is easily drawn." *Williams v. Vermont*, 472 U.S., at 24 n.8. Were ability to pay the true concern of its authors, they would have targeted relief based on some pre-existing difference among property owners, such as those with the least wealth, the lowest income, or the greatest need.

No mechanism in Proposition 13 exists to achieve the constitutional requirement of the "seasonable attainment of a rough equality in tax treatment among similarly situated property owners." *Allegheny*, 488 U.S., at 343. Like the Webster County welcome stranger method struck down in *Allegheny*, Proposition 13 now indisputably creates "gross disparities" in the taxes paid by long-time owners and recent buyers of comparable properties. Pet. App. A12. As acquisition values stray further and further from current circumstances and these "gross disparities" become

---

[8] Respondents' use of the word "efficient" to describe Proposition 13's effects (Br. at 21 n.17) seems especially contrived. A property tax system that distorts market forces and creates anti-competitive business effects by taxing recent and longtime property-owning competitors at vastly different levels can hardly be labelled "efficient." Nor can a taxing system with the anti-mobility effects of Proposition 13 — which traps homeowners in their present homes in order to avoid the huge tax penalties caused by moving — be described in any meaningful way as "efficient."

Amici Washington Legal Foundation, *et al.* concede that "[d]ifferent considerations may be involved in the case of business properties that generate revenue," (Br. at 11 n.3) but claim that issue is not before the Court. They are incorrect. Petitioner has challenged Proposition 13's assessment provisions — which do not distinguish between residential and commercial properties — in their entirety. J.A. 2, 56. Her high taxes are subsidizing both long-time commercial and long-time residential property owners.

manifest, any link between ability to pay (based on the original purchase price of property) and taxes presently assessed and payable becomes so attenuated and irrational as to require constitutional intervention.

B. Respondents Concede That Certainty Cannot Justify an Otherwise Irrational Tax Method.

Respondents do not contend that certainty in and of itself is a sufficient basis to sustain Proposition 13 as rational. Instead, they argue that taxpayers can predict with certainty the amount a "taxpayer has the ability and income to pay...." Resp. Br. at 23. This argument is nothing more than a rephrasing of their first argument, namely that an acquisition value tax system reasonably measures a taxpayer's ability to pay.

C. Respondents Attempt to Camouflage Proposition 13's True Purpose: to Place the Burden of Financing Increased Government Spending in Inflationary Times Entirely on Newcomers and New Buyers.

The sponsors of Proposition 13 candidly acknowledge that they designed the reassessment-upon-transfer provision of Proposition 13 in order to provide local governments with ever-increasing tax revenues — exclusively from new buyers — even while the taxes of longtime property owners remain low. *See Amicus Curiae* Brief of Howard Jarvis Taxpayers Ass'n, *et al.*, at 8-9, 15, 26. The Jarvis/Gann groups thus proudly claim that the massive disparities created by Proposition 13, combined with the $1.2 billion increase in taxes post-Proposition 13 buyers have had to pay, are the expected consequences of their scheme: Proposition 13 is working "precisely as ... intended." Br. at 8.

The argument that Proposition 13's reassessment-on-transfer provision was designed specifically to provide local governments with *increasing* revenues during long-term

inflationary periods was made both to the court below and to the court of appeal in the related *R.H. Macy* case.[9] The *R.H. Macy* court explained that "assurance of a stable revenue source for the local governments" was one of Proposition 13's purposes. *R.H. Macy*, 226 Cal.App.3d, at 360 n.2, 276 Cal.Rptr., at 535 n.2.

Respondents now offer a new "stable revenue source" justification, never before articulated, apparently seeking to camouflage this stark reality: the State's politically dominant longtime property owners successfully used Proposition 13 to keep their taxes low, while forcing newcomers to pay for increasingly higher taxes to maintain a high level of government services.[10] By twisting the "stable source of local revenue" explanation to mean something entirely different, respondents would have us believe that, after all their talk about the need to protect property owners from the effects of *inflation*, the drafters of

---

[9] *Nordlinger v. Lynch*, Brief of Howard Jarvis Taxpayers Ass'n, *et al.* as *Amici Curiae* in Support of Respondent, filed with the California Court of Appeal, at 6, 7-8, 39. *See also* Brief of Howard Jarvis Taxpayers Ass'n as *Amicus Curiae* in *R.H. Macy & Co., Inc. v. Contra Costa County*, 226 Cal.App.3d 352, 276 Cal.Rptr. 530 (1990), *cert. granted*, 111 S.Ct. 2256 (1991), *cert. dismissed*, 111 S.Ct. 2923 (1991).

[10] Respondents' argument that new buyers will not pay increasingly high taxes because Proposition 13's discrimination is mitigated by being capitalized into sales prices is simply erroneous. Resp. Br. at 25. Consider two homeowners, A and B, who live in houses of equal current market value. Homeowner A purchased his property before 1975, and has enjoyed low tax rates ever since. Homeowner B, like petitioner Nordlinger, purchased her property a few years ago, and has paid high taxes. According to respondents' argument, this discrimination should be redressed upon the sale of the properties. But this discriminatory treatment would only be mitigated if the long-time owner, who has long enjoyed low taxes, is unable to sell his home for as high a price as the highly taxed Homeowner B. By the same token, if Purchaser C intends to remain in the same home for the rest of his life, and Purchaser D expects to move in a few years, Purchaser C

Proposition 13 intended to protect local governments from the ravages of *deflation* and recession. By vastly underassessing long-held properties, respondents now argue, Proposition 13 guarantees that, in times of deflation, local governments will not have to reduce the assessments of long-held property even further (and lose expected revenues). Of course, this argument ignores the government's ability to maintain revenues under a traditional ad valorem system simply by raising the tax rate in an even-handed, non-discriminatory manner.

V.

PROPOSITION 13 IMPERMISSIBLY BURDENS THE RIGHT TO TRAVEL AND SHOULD BE SUBJECT TO HEIGHTENED JUDICIAL SCRUTINY.

A. Petitioner May Properly Raise the Question of the Level of Scrutiny to Which Proposition 13 Should Be Subject.

Respondents concede that petitioner satisfies the jurisdictional "case" or "controversy" requirement of Article III of the United States Constitution. Resp. Br. at 40. She has alleged injury from Proposition 13's inequitable taxation scheme and, if Proposition 13 is held invalid, her property taxes will be affected. Respondents claim, however, that because petitioner is not among "those 'newcomers' to California whose migratory rights have

[10](...continued)
hopes some day to be a beneficiary of the welcome stranger policy, while Purchaser D is nothing but a victim. The individual circumstances of all four taxpayers will not impact the market clearing price. Potential sellers and buyers would neither sell nor buy properties from individuals who expect to charge more, or pay less, than what is obtainable elsewhere. Thus, for neither sellers nor buyers does the capitalization of tax costs mitigate the discriminatory effects of the welcome stranger system.

allegedly been burdened," prudential considerations weigh against hearing her right to travel argument. Resp. Br. at 40. Respondents miss the point. Petitioner seeks simply to have this Court apply a higher standard of review to her equal protection claim than the minimal rational basis standard. This is a question on the merits of her claim, not a jurisdictional issue. *See Zobel v. Williams*, 457 U.S., at 60 n.6 ("right to travel analysis refers to little more than a particular application of equal protection analysis").

Respondents' reliance on third party standing cases is similarly misplaced. By narrowly construing the right to travel to affect only those who have migrated across state lines, respondents fail to recognize that Proposition 13 impedes the mobility of those within the State in the same way (and to the same extent) that it does those moving across state lines. As a recent buyer, petitioner is in precisely the same permanent, fixed class of disadvantaged residents as is the newcomer to the State who purchased property at the same time she did. Because petitioner and the newcomer share the same interest, concrete and sharp presentation of Proposition 13's impingement on the right to travel is assured.[11]

B. Proposition 13 Imposes Grossly Higher Taxes on Newcomers to the State and New Property Buyers.

Respondents contend that because Proposition 13 is not a residency requirement *in name*, it cannot implicate the fundamental right to travel. Respondents' analysis begs the question whether homeownership is a sufficient proxy for

[11] Any prudential considerations this case might otherwise raise have been overridden by California's grant of an express and expansive right of action to any taxpayer to seek declaratory relief from illegal or unconstitutional assessments. Cal. Rev. & Tax Code § 4808 (West Supp. 1992). Through legislation, Congress may expand standing and effectively limit the Court's standing inquiry to Article III considerations. *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91,
(continued...)

residency to render favorable treatment for longer term homeownership an impingement on the right to travel, just as favorable treatment for longer-term residents impinges the right. The key decisions all migrants to the state must make upon arrival are where they will live, in what type of home, and whether to rent or buy their homes — decisions all adversely affected by the welcome stranger scheme. The correlation between homeownership and residency is extremely close.

While respondents acknowledge that "[a] state law implicates the right to travel when ... it uses 'any classification which serves to penalize the exercise of that right,'" *Attorney General v. Soto-Lopez*, 476 U.S. 898, 903 (1986) (plurality opinion), quoting *Dunn v. Blumstein*, 405 U.S. 330, 340 (1972); Resp. Br. at 41-42, they simply assert that Proposition 13 does not impose such a penalty. But, by treating recent migrants who purchase homes upon arriving in California much less favorably than long-time residents who have owned their homes for many years, Proposition 13 creates precisely this sort of classification. The recent homebuying migrant pays annual property taxes several thousand dollars higher than the long-time owner of a comparable home, hardly an incidental amount despite respondents' assertion to the contrary. Resp. Br. at 41. This penalty is imposed simply because the migrant just arrived and bought a home, rather than having done so fifteen years earlier.

That Californians like petitioner who have recently purchased property also suffer the same permanent

[11](...continued)
100 (1979). There is no principled reason why state legislatures should not similarly be permitted to override the prudential limitations otherwise applied by the Court. *See Richardson v. Ramirez*, 418 U.S. 24, 39 (1974) ("California is at liberty to prescribe its own rules for class actions, subject only to whether limits may be imposed by the United States Constitution").

disadvantage does not save the classification from constitutional defect. As Justice O'Connor made clear in *Zobel*:

> The circumstance that some of the disfavored citizens already live in Alaska does not negate the fact that "the citizen of State A who ventures into [Alaska]" to establish a home labors under a continuous disability.

Zobel, 457 U.S., at 75; *see also Memorial Hospital v. Maricopa County*, 415 U.S. 250, 255-56 (1974).[12]

Despite respondents' recent repudiation of their earlier "class-a-day" view, Proposition 13 establishes fixed, permanent classes of taxpayers. A new migrant to the state who buys a home will never pay taxes as low as the taxes paid by the 1975 base year class. The new migrant can never enter that most favored class, while many long-time owners will remain in their favored class until death, at which time they can bequeath their favored tax status to their children.[13]

Proposition 13's authors used the politically appealing welcome stranger tax assessment method to shift the burden of future tax increases from the politically dominant property-owning majority to future newcomers and new buyers. The court below recognized that, once

[12] The fact that non-Californians can own California property, and thus may be in the most favored tax class, is similarly unpersuasive. It is only the very rare non-Californian who purchases a home in California and then moves into that home many years later.

[13] While, as respondents contend, residential property does turn over, nearly 60% of the Los Angeles County homes in existence at the time Proposition 13 passed remain in the same hands. This includes all properties with base years of 1978 or earlier, adjusted to remove homes newly constructed since that time. J.A. 37, 46-47.

entrenched, such manifestly unfair systems are virtually impossible to dislodge politically. Pet. App. A27 n.11. Because it permanently excludes have-nots and outsiders from its most privileged ranks, and thereby impedes the right to travel, Proposition 13 should be subjected to heightened scrutiny.

Respectfully submitted,

CARLYLE W. HALL, JR.*
MARY LOUISE COHEN
ANN E. CARLSON
ELIZA VORENBERG
Hall & Phillips
Counsel for Petitioner
**Counsel of Record*

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11852 Santa Monica Boulevard, Suite 3, Los Angeles, California 90025; that on February 11, 1992, I served the within *Reply Brief of Petitioner* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereupon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States Supreme Court
One First Street, N.W.
Washington, D.C. 20543
(*By Express Mail: original and forty copies*)

De Witt W. Clinton
David C. Muir
Albert Ramseyer
648 Hall of Administration
500 West Temple Street
Los Angeles, California 90012

Rex E. Lee
Carter G. Phillips
Mark D. Hopson
Christopher R. Drahozal
Sidley & Austin
1722 Eye Street, N.W.
Washington, D.C. 20006

California Attorney General
Daniel Lungren
3580 Wilshire Boulevard
9th Floor
Los Angeles, California 90010

I declare under penalty of perjury that the foregoing is true and correct. Executed on February 11, 1992, at Los Angeles, California.

Betty J. Malloy
(Original signed)